No. 89-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

FRANKLYN C. NOFZIGER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONER

Petitioner United States of America submits this brief in reply to the Brief for the Respondent in Opposition ("Opp."). For most of the points raised in the Brief in Opposition, we rely on the Petition. A few points merit attention in this Reply.

A. The heart of this case on the merits is the authoritative legislative history that with extraordinary clarity confirms the government's interpretation of 18 U.S.C. § 207(c). See Pet. 12-15. The conferees, it will be recalled, chose the House version of § 207(c) in preference to a conflicting Senate version and, in doing so, paraphrased the version they were choosing so as to make unmistakable that it described two separate offenses, to only the first of which did the element "knowingly" pertain.

Respondent has nothing of weight to say on this point. He quotes the opinion of the panel majority below (Opp. 18), where it insisted that conferees, to make authoritative their understanding of what their choice between conflicting terms of Senate and House bills means, must not only paraphrase the chosen terms in the Conference Report but must also say something more. That misconception of the office of a conference report also underlies respondent's assertion that Judge Edwards, in dissent, "confus[ed]" the terms of the chosen House version with the conferees' paraphrase. Opp. 17 n.8. To the contrary, Judge Edwards simply took the paraphrase at its face value as an authoritative resolution of any possible ambiguity in the terms of the House version of the bill. That is what legislative history is for.

B. In a footnote, respondent states that the independent counsel's "theory of prosecution"—that § 207(c) means what the Petition contends it means—"would have been an unlikely one for the Department of Justice to pursue when it concededly * * * is contrary to the interpretation of the Act set forth in the Department's own regulations." Opp. 7 n.2. To the contrary, the independent counsel, as required by 28 U.S.C. § 594(f), took steps to ensure that his statutory interpretation and this prosecution were consistent with the practices and policies of the Department of Justice. Had he been told that the Department would never prosecute on such a theory, the prosecution would not have been brought on this theory.

C. In two places, respondent attempts to capitalize on the trial judge's exclusion of evidence relating to respondent's proffered "advice of counsel" defense. In the first place, respondent says that his proffer of testimony "regarding certain advice he received from his lawyer, who was present when one of the communications was made, was excluded as immaterial." Opp. 4. That is only part of the story. The proffered testimony (which, at the outside, went to but one of the three counts on which he was convicted) was that Nofziger's lawyer advised him in

February 1982 that it would be appropriate if Nofziger assisted him or worked with him on the Fairchild matter, as to which Nofziger did not communicate with the White House until the following September. 2/5/88 Tr. 3578-79. The judge stated that he was ruling "that if that is considered advice of counsel, that it is of questionable relevance, insofar[] as a meeting of September of '82 is concerned as set forth in Count IV of the indictment. It is too attenuat[ed]." 2/5/88 Tr. 3579. Thus the lapse of time was an independent basis for excluding the testimony, separate from the accompanying ruling that the testimony was "immaterial" because "specific intent" was not an element of the offense. Nofziger therefore did not have a good "advice of counsel" defense, regardless of the elements of the § 207(c) offense.

Nofziger's second reference is to the same ruling. He states: "It would seem wholly inconsistent to suggest that there is a duty of inquiry but then to obtain exclusion at trial of evidence of respondent's efforts, through his lawyers, to determine whether he was acting in conformity with the requirements of the statute." Opp. 11 n.5. This passage may suggest that Nofziger wanted to show that his lawyers took steps to make the inquiries that Nofziger failed to make about whether the matter was of "direct and substantial interest" to the White House. In fact, as described above, the proffer was much more limited. Moreover, the proffer related to events seven months before the communication at issue, by which time the extent of the White House interest might have changed. In any case, Nofziger did not urge in the trial court or in the court of appeals that he had a good faith belief that any of the matters he communicated about was not of "direct and substantial interest" to the White House.

D. Respondent criticizes the government for failing to explain what role the term "knowingly" performs on the government's interpretation of the statute. He claims that there are only two possibilities: first, that "know-

ingly" modifies only the phrase that is immediately adjacent, a construction that respondent says "gives an utterly trivial role to the knowledge requirement"; and, second, that knowledge of the agency interest must be proven when the defendant is charged with an unlawful appearance but not when the charge involves a communication, a construction that respondent says "would be utterly irrational." Opp. 16. It would not give "knowingly" an "utterly trivial role" to rule that it modifies only the immediately adjacent language, because by that construction "knowingly" prevents a defendant from being in violation of the law when, although it may appear to the outside world (or even to those he is lobbying) that he is appearing on behalf of a particular client, his subjective intent or understanding is different, and he is in truth exercising his citizen's right to petition. In any event, Congress chose a mental element for the communication offenses different from the one it chose for the appearance offense. The government has urged a construction of the communication offense that is faithful to the statutory language, the legislative history, and a sensible view of the congressional purpose.

E. Respondent contended that if H.R. 3660, the Ethics Reform Act of 1989, which was passed by the Congress on November 17, 1989, were to be signed by the President, then "the correctness of the court of appeals' interpretation of the language of the repealed statute will plainly be of no continuing importance." Opp. 10. The President signed the bill into law on November 30, 1989. Pub. L. No. 101-194. Nevertheless this case will continue to be an important one meriting review by this Court.

Section 101(a) of the new law amends 18 U.S.C. § 207 as a whole. Under the amended version of § 207(c), "knowingly" and "with intent to influence" each apply to both appearances before and communications with officers or employees of the former agency, but the requirement of a "direct and substantial interest" on the part of the

agency has been eliminated. See 135 Cong. Rec. S15990, S16080, H8991 (daily ed. Nov. 17, 1989). The previously existing language, however, continues to apply to officers and employees whose services terminate before January 1, 1991. §§ 102(a) & (b), 135 Cong. Rec. H8993. Thus, there can be prosecutions for the offense of which Nofziger was convicted, relying on the statutory language on which his conviction was based, at least as late as December 1996.[1] Any such prosecution of anyone who has resigned or will resign in the next 13 months, indeed, must rely on that language and not on the new version of § 207(c).[2] In short, the current version of § 207(c), far from being "repealed," continues to be effective and will remain so, for previously retired employees, after January 1, 1991.

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[1] Pursuant to 18 U.S.C. § 3282, a prosecution can be brought five years after an offense under current § 207(c), which could be committed as late as December 1991 by an employee who resigns as late as December 31, 1990. In fact, the prosecution of Nofziger in 1987 was based on events that occurred in 1982.

[2] Prosecutions under the similarly-worded current version of § 207(b)(i) can be brought at least as late as December 1997, and prosecutions under the similarly-worded current version of § 207(a) are possible for the indefinite future.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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